

FIDIC CONDITIONS OF CONTRACT AS A MODEL FOR AN INTERNATIONAL CONSTRUCTION CONTRACT

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Abstract

Construction Industry needs alternative dispute settlement mechanisms which are able to solve rapidly the disputes relating to especially international construction projects, even in the construction site as far as they emerge. A modern tender system shall begin with an efficient evaluation of the pre-qualification of applicants, and proceed with a tender procedure based on high quality tender documents, and carry on with the balanced conditions of contract which fairly distributes possible risks of future among the Employer and the Contractor.

Keywords: FIDIC, Conditions of Contract, Dispute Settlement, Employer, Contractor.

INTRODUCTION

In our country (Turkey), both property developer contractors, who started their works by building apartments with some flats on lands of third parties/individuals, and our (Turkish) construction companies which still create masterpiece engineering construction jobs all over the world by using the latest technologies, in a sense, being lumped together are called “contractors”. In this article, after examining the content of the FIDIC standard contract and conditions of contract in detail, a model general contracting contract for international construction works in accordance with FIDIC model is given.

A. FIDIC IN GENERAL

“Being established in Lausanne, in Switzerland in 1913, two professional organizations; the “Fédération Internationale des Ingénieurs Conseils” (International Federation of Consulting Engineers) and the “Fédération Internationale du Bâtiment et des Travaux Publics” (International Federation of Housing and Public Works), jointly preparing The FIDIC Suite of Contracts, have published the first edition in 1957.”¹ Members of FIDIC include Association of Turkish Consulting Engineers and Architects, 67 countries’ national associations of consultant engineers. The Federation prepares the rules of the world technical consultancy and publishes the related documents. EFCA (European Federation of Consulting Engineers Associations), was founded in 1992 and gathers 25 national consultant engineer associations from 24 European countries under the umbrella of the federation. The EFCA is an independent professional organization which is in constant communication with organizations representing the European Union in order to prepare directives and regulations affecting consultant engineering and architecture services, to be fair to profession and community.

“FIDIC Standard Forms of Contracts, in 1969, when the document was approved and ratified by the “International Federation of Asian and Western Pacific Contractors' Associations” and “Associated General Contractors of America and ” and “Inter-American Federation of the Construction Industry” in 1971, precisely have gained an international identity.”² After the first edition of the FIDIC Contracts, containing some important changes over time as a result of experiences brought by the application, the new editions have been published. While preparing its own Standard Form of Contracts, FIDIC inspired from the first edition of the Standard Form of Contracts published by “Institute of Civil Engineers” (ICE) in 1945. Similarly while preparing the sixth edition published in 1991, ICE inspired from the fourth edition of the Standard Form of Contracts published by FIDIC in 1987.³ In other words, British (ICE) the Standard Form of Contracts and Swiss (FIDIC) the Standard Form of Contracts are the Construction Contracts contain almost the same provisions. Such as scope and nature of construction works is clearly defined in technical conditions of Contracts and drawings, constitute the legal basis for construction work for the completion of the construction project at the desired time and within budget, how to perform each stage, what the risks and responsibilities are should be clearly and precisely defined.

¹ Türegün, N., “FIDIC Açısından İnşaat Sözleşmeleri”, İnşaat Sözleşmeleri (Ortak Seminer, 18-29 Mart 1996), 2. Tıpkı Basım, Banka ve Ticaret Hukuku Araştırma Enstitüsü, Ankara 2001, p.254.

² Türegün, ibid., p.254.

³ Türegün, ibid., p.254; Hereof see Corbett, E.C.: 4th FIDIC Practical Legal Guide.

Published in 1987 and known as the "Red Book", 4th edition of the FIDIC Construction Works Administration Specification, is being used very widely for international construction works, due to it has established a fair balance risk between the Contractor and the Employer, has contributed successfully completion of a number of large-scale infrastructure projects around the world. Changing in 1996 Conditions of Contract for Construction works, FIDIC 1987 edition, an addition regulating the Dispute Resolution Board has been published to be used as a tool for disputes arising among the Contract parties during the execution of works. Because, as recently been observed in practice, contracting authorities have started to apply widely adding Special Conditions to Contracts to disrupt the balance of risk against the Contractor between the parties provided initially. Such applications lead to the emergence of long-lasting disputes inevitably during force of the Contract between the The Contracting Authority and the Contractor. The Turkish contracting companies which have undertaken construction projects abroad since 1972, both participating in tenders open to international competition and while concluding a Construction Contract with the construction authority in a foreign country, they often encounter standard forms of FIDIC Contracts and Conditions of Contracts. Moreover, basing on FIDIC Standard Forms of Contracts are generally required by foreign employers and international funding institutions for the Construction Contracts in Turkey and abroad for the projects which will be funded by international credit institutions such as World Bank and credit consorsias established by foreign banks.

"In addition, as the international character of the FIDIC standard forms of Contracts, such Contracts can be used not only for international tender but also for national ones. In fact, sometimes, by releasing international tender, in case FIDIC Contracts application provided for, depending on who wins the tender, domestic or foreign contractor, the situations were seen that the Employer has made changes over the FIDIC conditions. Such sample situation has been experienced in Erzincan Earthquake Rehabilitation and Reconstruction Project. In this project, by FIDIC 67.1. Clause under the title "Dispute Settlement" regulating the procedure that the Contractor or the Employer to resort to arbitration against the decisions of the Engineer entitled as "Decisions of the Engineer", if the Contractor or his responsible partner is a foreigner, the dispute shall be resorted to the court of arbitration according to the International Chamber of Commerce (ICC) Arbitration Rules. If the Contractor is a Turkish company, settlement procedures was created in a different way as the dispute shall be resorted to the courts of Ankara. In this project, in Erzincan, Turkish contractors have completed construction work under the conditions of FIDIC as a result of not an international construction business, initially an international tender was released, but eventually turning into a national tender was applied as a construction project contract." ⁴

FIDIC published 5th edition of the Conditions of Contract for Construction Works in 1999. In 1999, by making some changes in the system of conditions for Construction Contracts, FIDIC has published four model Conditions of Contract. These four Conditions of Contract have been regulated as 20 Clauses. None of these books has been not yet translated into Turkish and the 5th edition is, the most used and the most well known, the red book. Sample Conditions of Contracts of FIDIC 1999 edition are as follows:

- 1. Conditions of Contract for Construction:** Conditions of Contract, also known as the "Red Book", identifies the basic principles of procurement and Construction Contract. In this Conditions of Contract, the Project of the Work is prepared by the Employer or made it prepared, execution of the construction work by the Contractor is provided for.
- 2. Conditions of Contract for Plant and Design-Build:** This Conditions of Contract, also known as "Yellow Book", has been prepared for use design and construction or installation to be made by the Contractor in the construction and engineering work.
- 3. Conditions of Contract for Engineering Purchase Construction (EPC) / Turnkey:** The Conditions of Contract, also known as "Silver Book" is recommended for works to be performed turnkey projects such as power plants, factories or water treatment plant.
- 4. Short Form of Contract:** The Conditions of Contract, also known as "Green Book", provides for a different regulation rather than previous conditions. According to this different regulation, FIDIC, for any building or engineering work of which the Contract price is less than U.S. \$ 500,000 and is provided for to be completed in 6 months, through accepting that the supervision service can be provided by the The Contracting Authority, hasn't required to employ a consultant engineer for the supervision of construction work.

Briefly introduced above books (Conditions of Contract) consist of two parts.

⁴ Türeğün, *ibid.*, p.255.

The first part consists of the general principles that should be included in Contracts, while the second part has the nature of guiding for the Special Conditions that will be prepared in accordance with the first part, basing on the nature of the Work of each tender. Systematically compatible with each other as well as by making changes, the Conditions of Contract the first part is regulated as 20 Clauses and second part is associated with the first part as Clauses and titles. Mostly the Red Book is applied in Construction works in our country (Turkey). European International Contractors (EIC) strongly maintains that Multilateral Development Banks (MDBs) should only use Construction Contracts with a balanced allocation of risk in key items, such as design, physical obstructions, amount of work to be done as well as for the amounts and duration of contract securities, the certification procedure and the terms of payment.⁵ Where MDBs prescribe the use of standard Conditions of Contract through the MDBs' Standard Bidding Documents, as for instance the FIDIC standard contract documents, it is of paramount importance that the procurement guidelines oblige the The Contracting Authority not to deviate from the General Conditions, as they provide, to a large extent, a fair balance of risk.⁶

In the case of the FIDIC 1999 Conditions of Contract for Engineering, Procurement and Construction (EPC)/Turnkey Projects ("Silver Book"), it has been pointed out in the Introductory Note that this standard contract form actually departs from the traditional approach of a balanced risk sharing and, therefore, the "Silver Book" is not suitable in many circumstances. With the aim of creating an even-handed Construction Contract based on the FIDIC 1999 standard contract forms, EIC has published a series of "EIC Contractor's Guides to the FIDIC 1999 New Books". These Guides highlight the potential risks and pitfalls of each of the new FIDIC standard forms and they are considered both by FIDIC and the international construction lawyers' community as a useful checklist to all parties before undertaking an international contract.

In addition, the Conditions of Contract should contain terms that make the use of binding Dispute Boards and of International Arbitration mandatory on the parties. They are well-suited tools for the The Contracting Authority and the Contractor to avoid litigation. If prescribed by the MDBs in their Standard Bidding Documents and the appropriate standard contract form, both mechanisms will contribute to a reduction in contingencies in the Contract price for the uncertain effect that local dispute resolution may have where it is not up to the highest standards set for such procedures. In the case of international arbitration, such resolution by international arbitration should not be subject to any further approval by any of the The Contracting Authority's state authorities. However, the problem remains that many developing countries still have not ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) or, even if they have, they often do not recognise such awards. Hence, either party may contest an award. EIC proposes that the Loan Agreements on the part of the recipient countries stipulate that the country will surrender to such awards being final and irrevocable. Even so, there may still be cases where local legislation overrules and opens up the award. In these cases, MDBs should be prepared to intervene vis-à-vis the recipient country.⁷

The Particular Conditions should only be employed to regulate the project and the country specifics and should not be used to re-allocate the risks, which is sometimes the case. Hence, EIC asks the MDBs to develop and agree finally on standard country-specific Particular Conditions in order to avoid open-ended possibilities for deviation from the General Conditions. MDBs should prescribe in their Loan Agreements that the Particular Conditions may not deviate from the allocation of risks as set out in the General Conditions. MDBs should not approve bidding documents which contain such deviation and, as a consequence, Contracting Authorities may not disqualify a tenderer who has based a given qualification on such a prohibited deviation by the The Contracting Authority. Ultimately, the Appendix to Tender as defined by the FIDIC Conditions should be completed in accordance with international standards and should not place an excessive burden on the Contractor for items such as Liquidated Damages, Performance Bonds, and the like.⁸

B. PARTS OF FIDIC CONDITIONS OF CONTRACT AND THE FORM OF CONSTRUCTION CONTRACT PROVIDED FOR

"FIDIC President Julian S. Tritton has stated in the introduction of Conditions of Contract in 1957 that FIDIC published the first edition of the Conditions of Contracts of which the purpose was "the fair allocation of risks between the Contractor and the Employer". In this context, it is observed that the FIDIC Conditions of Contracts mainly intends to establish a balance, or even to prevent the oppression of the Contractor's against the Employer."⁹

⁵ EIC, Blue Book, p.29.

⁶ EIC, *ibid.*, p.29.

⁷ EIC, *ibid.*, p.30.

⁸ EIC, *ibid.*, p.30.

⁹ Türegün, *ibid.*, p.256.

In this study, in the nature of the fundamental book of FIDIC Conditions of Contract the 4th edition 1987 "Conditions of Contract for Construction Works" (the Red Book) mainly used as a model for both participation of Turkish contractors abroad in international tenders and international tenders in Turkey is examined. However, where necessary, the explanations are given on regulations in the 5th edition of the Red book which has been published in 1999, but not yet translated into Turkish. "Tritton explains that many provisions of Conditions of Contracts of FIDIC a product of experiences acquired in exercise of the Construction Contracts in the world, are applied consistently as general provisions, some provisions are modified essentially according to the location and conditions of the construction business and therefore the first part consists of General Conditions and the second part consists of Special Application Conditions in FIDIC Conditions of Contracts." ¹⁰

"Later a third part, the "Scanning and Filling" works for especially the construction of ports has been added to these two parts and sometimes this third part is located at the end of the second part. In this third part, how to change some of the provisions inconsistent with features of scanning and filling activities in the first and second parts and what provisions can be issued instead of them are taken into place." ¹¹ However, exercise of the third part is rare, its content will not be covered in this study. FIDIC also has prepared a tender with its annex and a short text of the Standard Form of Contract. "It is not possible to distinguish the first and second parts of the FIDIC Conditions of Contract from each other. Equipped with internationally accepted main rules in the first part and the second part containing the variable conditions such as socio-economic conditions of that country where the Work to be executed, geological conditions, the limits of the Employer's desire to intervene in work, delivery of the Work in whole or in parts. These two parts constitute together one FIDIC Conditions of Contract." ¹²

"FIDIC published a second part in the nature of recommendation, changes to made in the second part which should be necessary for the Clauses in the first part to become suitable for the local conditions. However, the practice shows that, Part II Special Applications Conditions emerge as the conditions which contain all the changes that the Employer wants in favor of him in direction of his own desire and will in Part I, General Conditions rather than the Special Conditions required by local circumstances as special conditions." ¹³

The first part consists of 72 Clauses and 160 Sub-Clauses under the title "General Administrative Conditions of Contract". In this section, fundamental principles about how to regulate a Construction Contract are determined.

The second part explains as an example of how the Employers can make regulations according to required local conditions and work in each separate Construction Contract, referring the principles in the first part under the title of "Special Administrative Conditions of Contract and Provisioning Principles".

At the end of the first part clearly referring to second part of the FIDIC Conditions of Contract, some additions can be done to some clauses; it has been assumed that some clauses could be modified. In addition referring to second part in Sub-Clause 5.1 on the Contract Language and the Applicable Law and the Sub-Clause 2.1 on duties and powers of the Engineer in the first part, it is requested from the practitioners to regulate these Clauses according to the feature of the Work.

Even the parties can make additions or removal to general conditions. However, in this case, the general conditions of the FIDIC between the trio of the Employer-Engineer-Contractor, should not interfere the created delicate balances. General and Special Conditions of FIDIC have legal advisory nature and no legal binding value on parties. The Employer shall determine additions and changes to be made according to the nature of the job. If the Employer is a real person or legal entity of private law, this matter does not cause a major problem. However, in case the Employer is legal person of public law financing of the construction work has been provided by conditional loans, while making modification in the first part of the Conditions of Contract, two important points should be considered: The first of these is approval of the institution, which provides credit the amendments in the Conditions of Contract. Secondly, the amendment should be allowed by the current legislation and it should be beneficial to the public. International organizations providing credit with loan agreements, even initially mandating procurement procedures to be made in accordance with the FIDIC Conditions of Contract and more open to international competition, on condition of abiding the fundamental principles, admit a lot of changes in the specifications the Contracting Authority that the end of the negotiations.

¹⁰ Türegün, *ibid.*, p.256.

¹¹ Türegün, *ibid.*, p.256.

¹² Türegün, *ibid.*, p.257.

¹³ Türegün, *ibid.*, p.257.

For example, it is observed that in many tenders made by the Directorate General of Highways in Turkey made a lot of changes in Conditions of Contract and these tenders show mixed features. Because the FIDIC Conditions of Contract regulates the provisions that will be subject to a Construction Contract which is a contract of special law, on condition of agreeing the parties, modification in the stage of the Work could be case in Contracts and Conditions of Contract. However authorities releasing a tender on behalf of public are the representatives of the public and their responsibilities are for the public since they are not for private employers. FIDIC General Administrative Conditions of Contract (Red Book), Clauses 51-52 regulate "work changes". According to these Clauses, the Engineer after the start of working may ask the Contractor to make a number of new work related manufacturing and similar previously not provided for. The Contractor must meet these demands of the Engineer. In this respect, the right to appeal which is entitled the Contractor is limited.

The second part provisions which facilitate to adapt the performance according to the conditions, have the same Clause numbers with the first part general provisions, preparing a concrete Construction Contract. Generally examples and an explanation follow the second part provisions. Such presentation increases the use of standard form in practice for people who will draw up a Construction Contract.

FIDIC Conditions of Contract are recommended for general use in works subject to international tender and also suitable for use in national tenders. It has been accepted, while preparing FIDIC Conditions of Contract, that some Clauses shall be implemented generally and some should be modified depending on the features of the Work and location. The Clauses that shall be applied generally in the general Conditions of Contract, have been issued as facilitating as to be included and drawn up to the texts of Construction Contracts. General Conditions of Contracts and the Special Conditions of Contracts in second part are linked to each other by numbering the Clauses mutually, thus the first and second part together create the Conditions of Contract, has gained integrity that covers the entire rights and duties of the parties.

The second part should be formed specially to suit each original contract. If scanning and some land improvement works are in question, a special care should be taken in the second part.

C. SCOPE OF GENERAL CONDITIONS OF CONTRACT AND ATTACHMENTS

Systematic of the General Administrative Conditions of Contract section with 72 Clauses is as follows:

Definitions and Interpretation

- 1.1 Definitions
- 1.2 Headings and Marginal Notes
- 1.3 Interpretation
- 1.4 Singular and Plural
- 1.5 Notices, Consents, Approvals, Certificates and Determinations

Engineer and Engineer's Representative

- 2.1 Engineer's Duties and Authority
- 2.2 Engineer's Representative
- 2.3 Engineer's Authority to Delegate
- 2.4 Appointment of Assistants
- 2.5 Instructions in Writing
- 2.6 Engineer to Act Impartially

Assignment and Subcontracting

- 3.1 Assignment of Contract
- 4.1 Subcontracting
- 4.2 Assignment of Subcontractors' Obligations

Contract Documents

- 5.1 Languages and Law
- 5.2 Priority of Contract Documents
- 6.1 Custody and Supply of Drawings and Documents
- 6.2 One Copy of Drawings to be Kept on Site
- 6.3 Disruption of Progress
- 6.4 Delays and Cost of Delay of Drawings
- 6.5 Failure by Contractor to Submit Drawings
- 7.1 Supplementary Drawings and Instructions
- 7.2 Permanent Works Designed by Contractor
- 7.3 Responsibility Unaffected by Approval

General Obligations

- 8.1 Contractor's General Responsibilities
- 8.2 Site Operations and Methods of Construction
- 9.1 Contract Agreement
- 10.1 Performance Security
- 10.2 Period of Validity of Performance Security
- 10.3 Claims under Performance Security
- 11.1 Inspection of Site
- 12.1 Sufficiency of Tender
- 12.2 Not Foreseeable Physical Obstructions or Conditions
- 13.1 Work to be in Accordance with Contract
- 14.1 Programme to be Submitted
- 14.2 Revised Programme
- 14.3 Cash Flow Estimate to be Submitted
- 14.4 Contractor not Relieved of Duties or Responsibilities
- 15.1 Contractor's Superintendence
- 16.1 Contractor's Employees
- 16.2 Engineer at Liberty to Object
- 17.1 Setting-out
- 18.1 Boreholes and Exploratory Excavation
- 19.1 Safety, Security and Protection of the Environment
- 19.2 Employer's Responsibilities
- 20.1 Care of Works
- 20.2 Responsibility to Rectify Loss or Damage
- 20.3 Loss or Damage Due to Employer's Risks
- 20.4 Employer's Risks
- 21.1 Insurance of Works and Contractor's Equipment
- 21.2 Scope of Cover
- 21.3 Responsibility for Amounts not Recovered
- 21.4 Exclusions
- 22.1 Damage to Persons and Property
- 22.2 Exceptions
- 22.3 Indemnity by Employer
- 23.1 Third Party Insurance (including Employer's Property)
- 23.2 Minimum Amount of Insurance
- 23.3 Cross Liabilities
- 24.1 Accident or Injury to Workmen
- 24.2 Insurance Against Accident to Workmen
- 25.1 Evidence and Terms of Insurances
- 25.2 Adequacy of Insurances
- 25.3 Remedy on Contractor's Failure to Insure
- 25.4 Compliance with Policy Conditions
- 26.1 Compliance with Statutes, Regulations
- 27.1 Fossils
- 28.1 Patent Rights
- 28.2 Royalties
- 29.1 Interference with Traffic and Adjoining Properties
- 30.1 Avoidance of Damage to Roads
- 30.2 Transport of Contractor's Equipment or Temporary Works
- 30.3 Transport of Materials or Plant
- 30.4 Waterborne Traffic
- 31.1 Opportunities for Other Contractors
- 31.2 Facilities for Other Contractors
- 32.1 Contractor to Keep Site Clear
- 33.1 Clearance of Site on Completion

Labour

- 34.1 Engagement of Staff and Labour
- 35.1 Returns of Labour and Contractor's Equipment

Quality of Materials, Plant and Workmanship

- 36.1 Quality of Materials, Plant and Workmanship
- 36.2 Cost of Samples
- 36.3 Cost of Tests
- 36.4 Cost of Tests not Provided for
- 36.5 Engineer's Determination where Tests not Provided for
- 37.1 Inspection of Operations
- 37.2 Inspection and Testing
- 37.3 Dates for Inspection and Testing
- 37.4 Rejection
- 37.5 Independent Inspection
- 38.1 Examination of Work before Covering up
- 38.2 Uncovering and Making Openings
- 39.1 Removal of Improper Work, Materials or Plant
- 39.2 Default of Contractor in Compliance

Suspension

- 40.1 Suspension of Work
- 40.2 Engineer's Determination following Suspension
- 40.3 Suspension lasting more than 84 Days

Commencement and Delays

- 42.1 Possession of Site and Access Thereto
- 42.2 Failure to Give Possession
- 42.3 Rights of Way and Facilities
- 43.1 Time for Completion
- 44.1 Extension of Time for Completion
- 44.2 Contractor to Provide Notification and Detailed Particulars
- 44.3 Interim Determination of Extension
- 45.1 Restriction on Working Hours
- 46.1 Rate of Progress
- 47.1 Liquidated Damages for Delay
- 47.2 Reduction of Liquidated Damages
- 48.1 Taking-Over Certificate
- 48.2 Taking-Over of Sections or Parts
- 48.3 Substantial Completion of Parts
- 48.4 Surfaces Requiring Reinstatement

Defects Liability

- 49.1 Defects Liability Period
- 49.2 Completion of Outstanding Work and Remedying Defects
- 49.3 Cost of Remedying Defects
- 49.4 Contractor's Failure to Carry Out Instructions
- 50.1 Contractor to Search

Alterations, Additions and Omissions

- 51.1 Variations
- 51.2 Instructions for Variations
- 52.1 Valuation of Variations
- 52.2 Power of Engineer to Fix Rates
- 52.3 Variations Exceeding 15 percent
- 52.4 Daywork

Procedure for Claims

- 53.2 Contemporary Records
- 53.3 Substantiation of Claims
- 53.4 Failure to Comply
- 53.5 Payment of Claims

Contractor's Equipment, Temporary Works and Materials

- 54.1 Contractor's Equipment, Temporary Works and Materials; Exclusive Use for the Works
- 54.2 Employer not Liable for Damage

- 54.3 Customs Clearance
- 54.4 Re-export of Contractor's Equipment
- 54.5 Conditions of Hire of Contractor's Equipment
- 54.6 Costs for the Purpose of Clause 63
- 54.7 Incorporation of Clause in SubContracts
- 54.8 Approval of Materials not Implied

Measurement

- 55.1 Quantities
- 56.1 Works to be Measured
- 57.1 Method of Measurement
- 57.2 Breakdown of Lump Sum Items

Provisional Sums

- 58.1 Definition of "Provisional Sum"
- 58.2 Use of Provisional Sums
- 58.3 Production of Vouchers

Nominated Subcontractors

- 59.1 Definition of "Nominated Subcontractors"
- 59.2 Nominated Subcontractors; Objection to Nomination
- 59.3 Design Requirements to be Expressly Stated
- 59.4 Payments to Nominated Subcontractors
- 59.5 Certification of Payments to Nominated Subcontractors

Certificates and Payment

- 60.1 Monthly Statements
- 60.2 Monthly Payments
- 60.3 Payment of Retention Money
- 60.4 Correction of Certificates
- 60.5 Statement at Completion
- 60.6 Final Statement
- 60.7 Discharge
- 60.8 Final Payment Certificate
- 60.9 Cessation of Employer's Liability
- 60.10 Time for Payment
- 61.1 Approval only by Defects Liability Certificate
- 62.1 Defects Liability Certificate
- 62.2 Unfulfilled Obligations Remedies
- 63.1 Default of Contractor
- 63.2 Valuation at Date of Termination
- 63.3 Payment after Termination
- 63.4 Assignment of Benefit of Agreement
- 64.1 Urgent Remedial Work

Special Risks

- 65.1 No Liability for Special Risks
- 65.2 Special Risks
- 65.3 Damage to Works by Special Risks
- 65.4 Projectile, Missile
- 65.5 Increased Costs arising from Special Risks
- 65.6 Outbreak of War
- 65.7 Removal of Contractor's Equipment on Termination
- 65.8 Payment if Contract Terminated

Release from Performance

- 66.1 Payment in Even of Release from Performance

Settlement of Disputes

- 67.1 Engineer's Decision
- 67.2 Amicable Settlement
- 67.3 Arbitration
- 67.4 Failure to Comply with Engineer's Decision

Notices

- 68.1 Notice to Contractor
- 68.2 Notice to Employer and Engineer
- 68.3 Change of Address

Default of Employer

- 69.1 Default of Employer
- 69.2 Removal of Contractor's Equipment
- 69.3 Payment on Termination
- 69.4 Contractor's Entitlement to Suspend Work
- 69.5 Resumption of Work

Changes in Cost and Legislation

- 70.1 Increase or Decrease of Cost
- 70.2 Subsequent Legislation

Currency and Rates of Exchange

- 71.1 Currency Restrictions
- 72.1 Rates of Exchange
- 72.2 Currency Proportions
- 72.3 Currencies of Payment for Provisional Sums Tanımlar ve Yorumlar

In order to be completed, there may be some necessary additions to the some Sub-Clauses of the Conditions of Contracts, such as, Sub-Clauses 1.1.(a) (1), 5.1, 14.1,14.3,68.2 and 70.1. Also to complete the first part, or to make additions to the Clauses may be necessary in terms of covering special circumstances or types of work such as scanning. As mentioned before, "the Second Part: Special Administrative Conditions" and "the Second Part: Principles of Provisioning" have been published as separate documents. FIDIC Conditions of Contracts for Construction Works (General Administrative Conditions of Contracts) has an attachment consisting of three parts and this additional text has been prepared to be used together with the General Conditions of Contract.

The first part of the additional text titled as "Section A: Disputes Resolution Board " deals with the creation of a board to settle disputes. FIDIC "General Administrative Conditions of Contract" traditionally, used to transfer the decision making authorization to the Engineer in case a dispute arises between the Employer and the Contractor. But in recent years this role of the Engineer has been decreased and variety of methods have been developed for settlement of disputes. Increasingly preferred option related to Civil engineering works in the FIDIC Standard Form of Contracts is nominating initially in drawing up contract one or couple of experts who are capable to settle disputes by constantly and regularly watching the progress of the Work. Also FIDIC has the option of this is a more appropriate and acceptable solution rather than the entitled role of the Engineer in settling disputes. Thus the provisions in Section A of additional text are regarding the appointment of the dispute resolution board consisting of one or three members. This board shall undertake the responsibility of the earlier role and the authority of the Engineer in this subject.

Section B of the Additional text, titled as "The Lump Sum-Based Payment" deals with lump-sum payment system instead of quantity list provision. This chapter consists of the annexes and amendments to be made in the related Clauses in FIDIC General Administrative Conditions of Contract in order to provide payment based on Lump Sum System. Again Part B also includes amendments of bid and agreement according to the lump system. The section C of the Additional text titled as "Payment Approval delays", the text contains a different text to provide the Contractor Security, if the Engineer delays in approval of interim payments.

D. SCOPE OF PART TWO "SPECIAL ADMINISTRATIVE CONDITIONS OF CONTRACT"

FIDIC General Administrative Conditions of Contracts (Part One) and the Special Administrative Conditions of Contracts (Part Two) have an integrity that covers parties' all rights and duties. Therefore, a standard form is not intended for the second part, because the second part has to be prepared separately for each tender. In this context FIDIC Manual of the Special Administrative Conditions of Contracts is published, providing options for a variety of Clauses to help in this regard.

The second part Clauses may be required in following cases:

- 1) giving more information in the second part especially is requested in the first part, specifying otherwise the administrative Conditions of Contract shall be missing,
- 2) specifying in the first part that complementary information in the second part otherwise the administrative specifications should be,

- 3) Type characteristics or place of works requiring additional materials or paragraphs,
- 4) The laws of the relevant country or in exceptional circumstances requiring amendments in the first part, i.e. general conditions.

Specifying that a certain Clause will be canceled in whole or in part the first part. Such changes should be done replacing the Clause depending on the situation by giving all or part of it in the second part.

Scanning and some of the Works of Land Reclamation is in question, the second part needs special attention. Scanners are significantly more expensive than many items forming contractor equipment; such that, the capital value of a scanner, which will serve the Contract, generally may exceed the price of the Contract. Therefore, the most economical and efficient use of scanners depending on the nature of the Work and more important other factors will be in the interest of both the Employer and the Contractor. In this regard, giving permission to the Contractor to continue scanning works -day and night- seven days per week has become a tradition. Another difference in scanning works from normal civil engineering is, according to 48th Clause of General Administrative Conditions of Contract, that the Contractor shall not be responsible for correcting defects of approved works after the date of completion.

Explanations and examples regarding this and other similar matters, including Scanning works, are in the second part. In certain cases, additions to some other Clauses may be needed in the second part. Land Reclamation works, show big changes qualitatively; therefore, before deciding whether to have changes for Land Reclamation works similar to those adopted in scanning works in the second part, or to maintain the standard civil engineering form exactly, each specific situation should be evaluated separately. After these general explanations, in terms of understanding the proposed model Construction Contract in FIDIC documents, important clauses of FIDIC General Administrative Conditions of Contract, in this section of the study, the 4th edition, published in 1987 which is still widely used in practice, shall be examined and where necessary changes in the 5th edition, published in 1999, will be discussed.

E. THE EXPLANATIONS ON FIDIC GENERAL ADMINISTRATIVE CONDITIONS OF CONTRACT CLAUSES FREQUENTLY APPLIED IN PRACTICE

1. INSPECTION AND ACCEPTANCE

Because payment or partial payments are usually made on the basis of a Construction Contract, in administration phases of it, acceptance of the completed work or the later phases of the work has a great importance. This issue, in the Contract, is usually regulated diligently. Mostly Construction Contracts separately regulates the conditions for temporary admission and final acceptance. According to the regulation of Parties, the Engineer will grant approval and the Contractor will be entitled to receive some more money. Any subsequent variations in the provisions of a Construction Contract, regarding the removals and additions arise great difficulties in practice, because it is rarely possible to perform according to the initial work of a large construction project as in the original (and drawings). In this respect, Sub-Clause 52.1 of FIDIC General Administrative Conditions of Construction contains detailed rules about keeping the rates and prices fixed. All variations referred to in Clause 51 and any additions to the Contract Price which are required to be determined in accordance with Clause 52 (for the purposes of this Clause referred to as "varied work"), shall be valued at the rates and prices set out in the Contract if, in the opinion of the Engineer, the same shall be applicable.

If the Contract does not contain any rates or prices applicable to the varied work, the rates and prices in the Contract shall be used as the basis for valuation so far as may be reasonable, failing which, after due consultation by the Engineer with the Employer and the Contractor, suitable rates or prices shall be agreed upon between the Engineer and the Contractor. In the event of disagreement, the Engineer shall fix such rates or prices as are, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be included in certificates issued in accordance with Clause 60.

2. SUB-CONTRACTING

Where provided by the Contract (The Employer), the Contractor may subcontract some parts of the Works with the prior written consent of the Engineer. For example a hospital is to be built by a construction company, for instance, supply of X-ray and other clinical equipment can be done by Sub-Contractors who are expert on this field, transferring by the Contractor. FIDIC Conditions of Contract refers the Sub-Contractors who are approved by the Employer or the Engineer as "Nominated Subcontractors" and any payment in respect of work done or goods, materials, plant or services supplied by any nominated Subcontractor, the Engineer shall be entitled to demand from the Contractor reasonable proof that all payments, have been paid to the Sub-Contractor by the Contractor and if the Contractor fails to supply such proof then the Employer

shall be entitled to pay to such nominated Subcontractor directly.¹⁴ The Parties may agree on that always, upon the certificate of the Engineer or the Contractor, the Employer shall pay directly the Subcontractors.

According to Sub-Clause of FIDIC Conditions of Contract, the Contractor shall be responsible for the acts, defaults and neglects of any Subcontractor, his agents, servants or workmen as fully as if they were the acts, defaults or neglects of the Contractor, his agents, servants or workmen.

Sometimes, the Employer may employ some Contractors directly contracting with them who will be responsible for a certain piece of work, not providing the Work only one contractor. In addition, the Employer may contract with different contractors separately for the consecutive phases of construction work. This method, called as "Fast Track" can shorten the time required to complete all the Work, but requires careful planning and coordination and can lead to technical difficulties at various phases of the Work.

3. LEGAL STATUS OF THE ENGINEER

A typical characteristic of FIDIC Conditions of Contract is that the Engineer is required under the terms of his appointment by the Employer set out in Part II of these Conditions. As a technical expert, functions of the Engineer include elements such as giving his decision, opinion or consent, expressing his satisfaction or approval, determining value, or otherwise taking action which may affect the rights and obligations of the Employer or the Contractor. Except where otherwise provided by the Contract, the Employer shall appoint the Engineer. Therefore, just the Employer has a contractual relationship with the Engineer and the Contractor is not in such a contractual relationship. However the Engineer is not the employer's representative who has to take into consideration only the interests of the Employer. However, in the legal sense, the Engineer may be considered as an agent of the Employer.

The Contract with the Employer requires undertaking the role of impartial arbitrator between the Employer and the Contractor. In fact according to Sub-Clause 2.6 of FIDIC Conditions of Contract, the Engineer shall exercise his discretion impartially within the terms of the Contract and having regard to all the circumstances. If the Contractor is damaged by the decision of the Engineer and if the Engineer is appointed according to FIDIC Conditions of Contract, the appropriate solution for the Contractor is resorting to arbitration in accordance with Clause 67. Because, even the neglect of the Engineer is proved, winning a case due to such neglect is unlikely and because if the case is for compensation of economic loss, the possibility of passing the necessary test is very weak.

4. PRICE ADJUSTMENT

In a long-term contract or a Construction Contract, different pricing methods could be used. These are lump-sum method, cost plus profit method and unit price method. Lump sum method is widely used for providing accuracy in price mechanism, but in long-term contracts, in case mechanisms of price adjustment and revision are not included in the Contract, it can disrupt the balance of interests between the Employer and the Contractor. Cost + profit method requires submission from the Contractor to the Employer of the invoice for production cost, because a specific determined (percentage or amount) profit will be added to the total cost. In this method, an element of certainty is lacking. This method does not mean that the Employer as a buyer shall not have all risk of increases in construction costs. Many financial institutions do not prefer this pricing method.

In unit price method, because the parties agree on a rate for the unit construction, the total price to be paid will depend on the number of construction units to be used. Price to be determined for a construction unit should also include an extra reflecting the Contractor's profit. Unit price can be calculated on material basis such as the amount of cement used for a concrete mold or on basis of labor such as working time for a specific job. Obviously, this pricing method is not suitable for all types of Construction Contracts and long-term Contracts. In Construction Contracts to be prepared on the basis of FIDIC Conditions of Contracts, to include a detailed mechanism for price adjustment is very important. However some changes in prices are predictable, while some others are unpredictable. For predictable price changes, the procedure usually followed is an index-based price adjustment mechanism. An index basket is used in long-term Contracts. Reviewing changes in prices of this index basket (e.g. diesel, labor force, and cement) on a regular basis, it is determined whether to make any addition to the basic price. For the unpredictable events that affect the contract price, if the Contract is not varied according to the new price, a hardship Clause should be added to the Contract, where necessary to apply, for a party claiming rightly that this will cause a very important difficulty to him.

¹⁴ See Herzfeld, Edgar: "SubContracts in Long-Term Construction Contracts", [1984] J.B.L., p.226; also see Herzfeld, Edgar: "Nominated Sub-Contractors", [1985] J.B.L., p.386.

5. PERFORMANCE SECURITY, REIMBURSEMENT SECURITY AND PAYMENT SECURITY

In Construction Contracts, the Contractor's obtaining a performance security from a bank, insurance company or other third party to submit it to the Employer is common. The purpose of the security, avoid any damage suffering the Employer in case of failure of contractor in performance of contractual obligations. Performance Guarantee, in some cases, may be supplied with a security of reimbursement. Security of reimbursement, if the Employer has made advance payments on account the Contract price and if the Employer has concerns that the Contractor would not perform the Conditions of Contract, is provided to protect the Employer from these possibilities. Sometimes to guarantee the future financial demands of the Employer against the Contractor, the Employer may be requested to provide a payment security from a bank in an impartial country, like Switzerland. However, if the Employer is a public institution or a credit of a foreign country is a subject, the payment security is rarely required from the Employer.

6. RETENTION OF THE CONTRACTOR'S MONEY AS A GUARANTEE

In international Construction Contracts, the Contractor's certain amount of money is usually retained against the risk of non-compliance of work on time. In order to be sure that the Contractor executes his obligations under an international Construction Contract, the Contractor shall be entitled to retain 5 or 10 % of the total contract price for a certain period such as 6 or 12 months.

According to Sub-Clause of the World Bank Guidelines: "In order to ensure the Contract is executed fully by the Contractor in accordance with the Contract, the Contract may provide a certain percentage of the Contract price retained by the Employer. The guarantee should be extended over an adequate anticipated period of time to cover guarantee and maintenance period requested by the Contract. Alternatively, a separate security for that period can be obtained." In FIDIC Conditions of Contract the percentage and limits of the money to be retained are determined in the annexes of tender forms.

7. EXCHANGE CLAUSES

If the Contractor has to pay the foreign Sub-Contractors or the Employer has to pay Partner Contractors in different countries, the Exchange Clauses should be cared specially. Both The World Bank Guidelines (Sub-Clause 2.21-2.26) and the FIDIC General Conditions of Contracts (Sub-Clauses 71-72) contain detailed provisions regarding currencies of payment. In suitable cases, separation of foreign currency which are used for accounting and foreign currency which are used for payments, can provide a solution. Contract price, as well as the currency used for accounting, may be expressed by exchange rate of the country of the Employer. Payments may be made in different foreign exchanges of joint contractors or subcontractors and the General Contractor and these are payment rates. When this system is used, the exchange rate should be determined, in other words, the rate governing the rate of exchange will be valid on the day of payment.

8. INSURANCE AND COMPENSATION

A Construction Contract should contain provisions on insurance and compensation. According to Sub-Clause 2.36 of The World Bank Guidelines, the insurance types and conditions must be referred in tender documents.

According to Clauses 23-25, the Contractor shall insure the Workmen and against the third party risks, however if the Contractor fails to effect and keep in force any of the insurances, the Employer may effect and keep in force any such insurances.¹⁵ Also Sub-Clauses 22.1 and 24.1 of FIDIC Conditions of Contract set out the compensations to be paid by Employers and Contractors.

9. RISK SHARING IN CONSTRUCTION CONTRACTS

"During a Construction Contract disputes may arise between the parties for the following reasons"¹⁶:

- Inadequate and incomplete contract documentation,
- Drawing up an improper contract-style,
- Improper tender styles,
- Unreasonable risk burden on one of the parties,
- Improper personnel for the Project,
- The risk burden which arises from the Contract on the Party who is inadequate for this risk,
- Bankruptcy of one of the Parties,
- Coordination problems arising where more than two parties,
- Particularly settling indefinite conditions in the Contract that amending the conditions in the standart form of the Contract cause unreliable interpretations,

¹⁵ See, FIDIC General Administrative Conditions of Contract, Sub-Clause 25.3.

¹⁶ Uğur, L.O., İnşaat Sektöründe Riskler ve Risk Yönetimi, TMB yayını, Ankara, 2006, p.120.

- Transferring assesment of the decisions with indefinite Sub-Clauses to one of the Parties or Both Parties,
- Determining methods instead of determining the Parties who are liable to provide the required results,
- Insufficient architechtual and engineering drawings or designs.”

“Even drawing up Construction Contracts diligently at the beginning, it is always highly possible to arise disputes in the future.”¹⁷ “The purpose of the Construction Contract is to ensure a fair distribution of risks between the parties, determining the parties' rights, duties, responsibilities and obligations in advance. Not to fulfill duty and responsibility of one of the parties, because his own insufficiency, negligence, fault or any influence of an external event will break the balance of risk.”¹⁸ “A Construction Contract is an equalization of accepting between controllable and uncontrollable risks with the price deemed appropriate to undertake this work by the Covenanter. Price of the Work at least partially reflects the risk of this work deemed by the Contractor to execute the Work. In the fixed price lump sum method, contracts are encouraging for the Contractor performance in terms of risk which could be handled by the Contractor. However, contractual agreements should be concluded taking into account who will burden how much risk.”¹⁹

“The standard form Construction Contracts such as FIDIC Contracts, with the help of the conditions stated clearly in the Contract share the risk between the parties. However, the management of this risk distribution may differ. Standard Form of Contracts being used in the construction industry generally contain most of the risks and certifies a reconciliation between the parties.”²⁰ “Contracts prepared in official form for official works are drawn up according to special requests regarding legal liability. Generally, public officials do not want to accept price uncertainty due to financial and political reasons. Public managers often prefer fixed price lump-sum style, i.e. the Contracts in which the Contractor has the risk. But in private sector, customers such as large, growing companies take more risk regarding financial benefits and to be part of the design and construction. When customers' Contracts are concluded directly with sub-contractors, these construction management Contracts can provide advantages.”²¹ “In construction projects, not only controllable risks such as changes in administrative and operational performances, bad weather, the effect of inflation on costs, but also risks can not be controlled, such as a specific ground soil conditions are also important.”²²

10. LIQUIDATED DAMAGES FOR DELAY AND PREMIUM CLAUSES

According to Sub-Clause 47.1 of FIDIC General Conditions of Contract, if the Contractor fails to comply with the time for completion in accordance with Clause 48, for the whole of the Works or, if applicable, any Section within the relevant time prescribed by Clause 43, then the Contractor shall pay to the Employer the relevant sum stated in the Appendix to Tender as liquidated damages for such default and not as a penalty (which sum shall be the only monies due from the Contractor for such default) for every day or part of a day which shall elapse between the relevant time for completion and the date stated in a Taking-Over Certificate if the whole of the Works or the relevant Section, subject to the applicable limit stated in the Appendix to Tender. The Employer may, without prejudice to any other method of recovery, deduct the amount of such damages from any monies due or to become due to the Contractor. The payment or deduction of such damages shall not relieve the Contractor from his obligation to complete the Works, or from any other of his obligations and liabilities under the Contract.

Provisions for the cases such as if the Contractor delivers the Work before the time, paying him premium Clause is referred in Contracts less than Liquidated Damages for Delay. As a matter of fact that the early completion and deliver of the Work regulation for the payment of premium to the Contractor in FIDIC General Administrative Specification (first part) is not included; such premium Clause may be settled in FIDIC Special Application Conditions or Tender Annexes.

11. THE RELATIONSHIP BETWEEN GENERAL CONTRACTORS AND OTHER CONTRACTORS

“According to Sub-Clause 31.1 of FIDIC General Conditions of Contract, the Contractor shall be responsible to provide opportunities to the Employer's workmen and the other Contractors in the site, in accordance with the requirements of the Engineer.

¹⁷ Uğur, *ibid.*, p.120.

¹⁸ Uğur, *ibid.*, p.120.

¹⁹ Uğur, *ibid.*, p.120.

²⁰ Uğur, *ibid.*, p.120.

²¹ Uğur, *ibid.*, p.121.

²² Uğur, *ibid.*, p.121.

However, in such a case, FIDIC standard form Conditions of Contract has no concern with whether the working synchronization between contractors should be organized by the Engineer.”²³ “Working in a same construction site within the framework of the same construction project with separate Contracts, contractors generally encounter the “inter-face” problem (inter-section of works). This problem emerges especially in cases a contractor commences his work before another doesn’t complete his work.”²⁴ This problem usually occurs between the Sub-Contractors. “To fill this gap of the Standard form of Conditions of Contract, applying Sub-Clause 44.1 for the extension of time for completion, because of any delay, impediment or prevention by the Employer, and financially applying Sub-Clause 51.1 (f) providing for the Engineer to have the authority to change any specified sequence or timing of construction of any part of the Works.”²⁵

“If there is one General Contractor and his sub-contractors in a construction site, it is natural that the sole General Contractor shall be responsible for the work organization and synchronization.”²⁶ “In FIDIC General Conditions of Contract there are two types of Sub-Contractor; “approved Sub-Contractor” and “nominated Sub-Contractor.”²⁷ “Sub-contractor is a person who is dependent and has a contractual relationship with the Contractor and does pieceworking. However, Sub-Contractor is a person who undertakes a part of the Work (sometimes all) which is undertaken by the General Contractor and his relation with the General Contractor independently bases on Contract of Work.”²⁸ “In FIDIC General Conditions of Contract (in the 4th edition), The Approved Contractor expression has not been mentioned, instead, the issues such as supplying workers who do not require the approval of the engineer, purchasing the materials according to the standards specified in the Contract and giving any part of the Works to the Sub-Contractor named in the Contract are included. An issue that should be underlined here is in Turkish translations of FIDIC Conditions of Contract and even in national legislation related to construction law the use of phrase “sub-contractor” instead of “subcontracting” is inappropriate.”²⁹

F.PRIORITY OF CONTRACT DOCUMENTS, RULLING LANGUAGE AND APPLICABLE LAW

“According to Sub-Clause 5.2 of General Conditions of Contract, the several documents forming the Contract are to be taken as mutually explanatory of one another; but in case of ambiguities or discrepancies, the same shall be explained and adjusted by the Engineer who shall thereupon issue to the Contractor instructions thereon and in such event, unless otherwise provided in the Contract, the priority of the documents forming the Contract shall be as follows : ”³⁰

- (1) The Contract Agreement (if completed) ;
- (2) The Letter of Acceptance ;
- (3) The Tender ;
- (4) Part II of these Conditions ;
- (5) Part I of these Conditions ; and
- (6) Any other document forming part of the Contract.

“The text of the Contract agreement which has the first priority under any circumstances among the Contract documents signed between parties should be clear, understandable and written in an unsophisticated language.”³¹ “Because the tenders which are realized according to FIDIC Conditions of Contracts are in international nature and the parties are from different countries, there must be clearly stated in Part II of these Conditions of Contract that the language or languages in which the Contract documents shall be drawn up, and the country the law of which shall apply to the Contract & according to which the Contract shall be construed.”³²

“According to Sub Clauses 5.1., if the said documents are written in more than one language, the language according to which the Contract shall be construed and interpreted is also stated in Part II of these Conditions, being therein designated the “ruling language”. In practice, the ruling language is accepted as English in international tenders.

²³ Türegün, ibid., p.265.

²⁴ Türegün, ibid., p.265.

²⁵ Türegün, ibid., p.265.

²⁶ Türegün, ibid., p.266.

²⁷ Türegün, ibid., p.266.

²⁸ Türegün, ibid., p.266.

²⁹ Türegün, ibid., p.266.

³⁰ Güvenç, C., FIDIC Rapor, 26.04.2002, www.icisleri.gov.tr.

³¹ Güvenç, ibid.

³² Güvenç, ibid.

Parties may make the changes which they want in FIDIC general and special conditions and it is especially recommended for international construction contracts. However, where the financing of construction work is provided by an international financial institution, approval by this financial institution may be necessary.³³ “Which country’s law has been deemed to be applied on Construction Contract, FIDIC general conditions also are interpreted according to the law of that country.”³⁴

G. SECURITIES

In Clause 10 of General Conditions of Contract, the performance bond issue is regulated.

“According to Sub-Clause 10.1 titled as “Performance Security”, if the Contract requires the Contractor to obtain security for his proper performance of the Contract, he shall obtain and provide to the Employer such security within 28 days after the receipt of Letter of Acceptance, in the sum stated in the Appendix to Tender. When providing such security to the Employer, the Contractor shall notify the Engineer of so doing. Such security shall be in the form annexed to these Conditions or in such other form as may be agreed between the Employer and the Contractor. The institution providing such security shall be subject to the approval of the Employer. The cost of complying with the requirements of the Clause shall be borne by the Contractor, unless the Contract otherwise provides.

According to Sub-Clause 10.2., the performance security shall be valid until the Contractor has executed and completed the works and remedied any defects therein accordance with the Contract.

No claim shall be made against such security after the issue of the Defects Liability Certificate in accordance with Sub-Clause 62.1 and such security shall be returned to the Contractor within 14 days of the issue of the said Defects Liability Certificate. Prior to making a claim under the performance security the Employer shall, in every case, notify the Contractor stating the nature of the default in respect of which the claim is to be made. “Only the performance bond is issued, there are no regulations on the bid bond in FIDIC General Administrative Conditions of Contract.”³⁵ “FIDIC General Conditions of Contract, issues the performance bond as a discretionary, however in case provided for by the Construction Contract between the parties, the performance bond will be required.”³⁶ “In General conditions, there is no explanation about the amount of the performance bond and its rate according to the Contract price. Only in the second part (Special Application Conditions), providing style of the performance bond is regulated the equilibrium of the money and the rates specified in the annex bid according to sample Sub-Clause 10.1. In accordance with example Sub-Clause 10.4, if supplies, from where the performance bond shall be obtained, is restricted, the following additional paragraph may be included”³⁷:

“10.4. Supply of Performance Bond

In accordance with Sub-Clause 10.1, the Contractor shall obtain the Performance Bond from an Entity which is registered or licensed to do business in the country where the Works shall be executed ” (or)

“ 10.4. Supply of Performance Bond

If the Performance Bond is in the form of a bank guarantee, this guarantee must be issued by;

- (a) a Bank in the Country of the Employer or,
- (b) a Foreign Bank through a Correspondent Bank of the Employer's country.”

H. THE CONTRACTOR’S COMPLIANCE WITH STATUTES, REGULATIONS

According to Sub-Clause 26.1 of FIDIC General Conditions of Contract, the Contractor shall conform in all respects with regulations of any Nation or State.

“According to this sub Clause, the Contractor shall conform in all respects, including by the giving of all notices and the paying of all fees, with the provisions of :

a. any National or State Statute, Ordinance, or other Law, or any regulation, or byelaw of any local or other duly constituted authority in relation to the execution and completion of the Works and the remedying of any defects therein,

and the rules and regulations of all public bodies and companies whose property or rights are affected or may be affected in any way by the Works, and the Contractor shall keep the Employer indemnified against all penalties and liability of every kind for breach of any such provisions.

³³ Güvenç, *ibid.*

³⁴ Güvenç, *ibid.*

³⁵ Güvenç, *ibid.*

³⁶ Güvenç, *ibid.*

³⁷ Güvenç, *ibid.*

Provided always that the Employer shall be responsible for obtaining any planning, zoning or other similar permission required for the Works to proceed and shall indemnify the Contractor in accordance with Sub-Clause 22.3.”³⁸

I. VARIATIONS EXCEEDING

“In FIDIC Conditions of Contract, there is no special Clause regarding variations exceedings. The Parties shall agree on variation exceedings issue among them.”³⁹ “ Excess of 15 percent of the "Effective Contract Price in Sub-Clause 52.3 of FIDIC General Conditions of Contract is regarding not paying general expenditure to the Contractor for the variations exceedings up to 15 per cent. Thus when variations exceed 15 per cent, taking into account Site and general overhead costs, the Contractor shall be paid according to the determined sum. Otherwise the Contractor shall not make any request.”⁴⁰ “FIDIC Conditions of Contract are available, regardless rate, for the approval of variations exceedings by Contracting Authorities.”⁴¹

J. PROVISIONAL SUM

“Despite the absence in Public Works General Conditions of Contract and of application in local tenders in Turkey, in Construction Contracts prepared according to FIDIC Conditions of Contract, "Provisional Sum" is included which shall be used where necessary during the tender process.”⁴²

“According to Sub Clause 58.1, "Provisional Sum" means a sum included in the Contract and so designated in the Bill of Quantities for the execution of any part of the Works or for the supply of goods, materials, plant or services, or for contingencies, which sum may be used, in whole or in part, or not at all, on the instructions of the Engineer. The Contractor shall be entitled to only such amounts in respect of the Work, supply or contingencies to which such Provisional Sums relate as the Engineer shall notify the Contractor of any determination made under this Sub-Clause, with a copy to the Employer.”⁴³

”According to the Sub-Clause 58.3, the Contractor shall produce to the Engineer all quotations, invoices, vouchers and accounts or receipts in connection with expenditure in respect of Provisional Sums, except where work is valued in accordance with rates or prices set out in the Tender.”⁴⁴

The Clause 59 requires that some works can be executed by nominated sub-contractors and this Clause regulates its procedure. In Clause 58, the amount of provisional sum is not specified and the Engineer shall have authority to issue instructions for the expenditures. In the Clause text the provisional sum is provided for to be used wholly, partly or never, expenditures of provisional sums have the nature of arbitrary treatments. “When the Employer is a public authority; the amount, expenditure way and similar issues should be regulated clearly. And also by the Employer, approval of the authority of the Engineer to issue spending provisional sum will be suitable.”⁴⁵

K. PURSUING LEGAL PROCEEDINGS IN CASE OF DEFAULT OF THE CONTRACTOR

“FIDIC Conditions of Contract confer powers the Employer and the Engineer, if the Contractor does not comply with the Contract provisions. Sub-Clause 63.1 regulating this issue deals with the issues such as has failed to execute his obligations due to is deemed by law unable to pay his debts, enters bankruptcy, liquidation or dissolution, appointing a trustee, and if the Engineer has the opinion that he has repudiated the Contract, or without reasonable excuse has failed to commence the Works or to proceed with the Works sufficiently, despite previous warning from the Engineer, in writing, is otherwise persistently or flagrantly neglecting to comply with any of his obligations under the Contract, has not removed the materials, which are not accepted, within 28 days.”⁴⁶ “ In case of the above conditions if the Engineer gives notice to the Employer, with a copy to the Contractor, and the Employer may give 14 days notice to the Contractor, enter upon the site and the Works and terminate the employment of the Contractor without thereby releasing the Contractor from any of his obligations or liabilities under the Contract, or affecting the rights and authorities conferred on the Employer or the Engineer by the Contract, and may himself complete the Works or may employ any other contractor to complete the Works.

³⁸ Güvenç, ibid.

³⁹ Güvenç, ibid.

⁴⁰ Güvenç, ibid.

⁴¹ Güvenç, ibid.

⁴² Güvenç, ibid.

⁴³ Güvenç, ibid.

⁴⁴ Güvenç, ibid.

⁴⁵ Güvenç, ibid.

⁴⁶ Güvenç, ibid.

The Employer or such other contractor may use for such completion so much of the Contractor's Equipment, Temporary Works and materials as he or they may think proper."⁴⁷

CONCLUSION

At the beginning of the twenty-first century, the international construction services sector with its related peripheral services, operating through assistants and partners in its original structure, faces with both opportunities and challenges. Wide range of factors which are affecting job opportunities of international contracting services sector abroad; the matters such as international financing of infrastructure projects, international procurement procedures and standard contract forms, international arbitration and alternative dispute settlement mechanisms, export credit insurance and the removal of barriers to entry into foreign construction markets stand out as priority issues. While need of infrastructure is increasing on a global scale day by day, it is observed in general that there are world-wide difficulties in finding funds required for new construction and maintenance activities in the field of infrastructures. Under this circumstance as a new method of financing of infrastructure investments and the conducting of infrastructure services, bringing into force more the public-private partnership model is emerging as a current solution. 5th edition, published by FIDIC in 1999, the new red, yellow, and silver-colored books (general and Special Conditions of Contracts), in other words, the standard contract forms, have been imposing the risk of the construction to contractor, more than what was seen in the past.

However, in most countries in Asia, Africa and Latin America still the 4th edition red book published in 1987 currently is used widely in drawing up Construction Contracts and in international tenders, it is understood that it would take some more time that the new edition of FIDIC type Conditions of Contract would replace entirely the old edition version. A modern tender system must begin with the effective pre-qualification assessment of the applicants and must continue with a tender procedure based on high-quality tender documents and the balanced conditions of the Contract which distribute possible future risks in a fair manner among the Employer and the Contractor. The construction industry, particularly international construction projects need special alternative dispute settlement mechanisms that can provide rapid settlement, even if possible just then on the site as far as they emerge, related to construction projects. The current practice of export credit insurance coverage provided by insurance companies is limited to political and commercial risks; environmental, social and cultural capacity to mitigate risk is negligible. Because the traditional construction activity fulfills the instructions which are based on technical criteria and conditions which are determined by the Employers and their consultant engineers, capacity of influencing environmental aspects of the construction work of contractor, is limited to the tender documents prepared by third parties and designs (drawings) and national legislation of the foreign country where the construction is built.

In June 2003, some of the world's largest and most famous private financial institutions have adopted the "Principles of Ecuador". These guiding principles aim to guarantee the development of socially responsible and environmentally harmless construction projects funded by these credit institutions. In fact, the conference of the General Assembly of the European International Contractors Association in Istanbul on April 15, 2004, as selecting the subject as "Export Credit Insurance and Environmental and Social Standards in Project Finance" emphasizes the importance of the new standards of international financing for infrastructure projects in developing countries. China which became a member of the World Trade Organization in 2001, by adopting new legal regulations contrary to its commitments, created new barriers against foreign contractors to get into Chinese construction market. Restrictions, which are provided for by China's new legislation, such as the nature of barriers in order to restrict market entry, residence Clause for foreign contractors, the number of foreign engineers, obligations to bring certain capital have been relaxed as a result of partially becoming successful efforts, which are carried out in cooperation with the European Commission and other international organizations, to convince Chinese Government in order to attract more international construction companies to Chinese construction market.

After recent developments in the agenda of international contracting sector have been assessed above, when we discuss this topic in our country's International Contracting services sector, as the main problems in the agenda of the sector, following are calling the attention most: A need of creating more effective coordination in the bureaucracy, difficulty to find financing and ensuring letters of guarantee, social security, the difficulty of obtaining information about foreign markets, lack of publicity, focusing on certain areas and not entering to new markets, the "Avoidance of Double Taxation" and "Promotion and Reciprocal Protection of Investment" agreements that could not have been completed yet in all the countries where business activities are being carried out and,

⁴⁷ Güvenç, *ibid.*

tarnishing the positive image of the sector because in terms of technique and experience inadequate Turkish construction firms in the sector undertake works abroad and Turkish technical consultancy and engineering firms abroad not being active adequately. By solving the problems outlined above as soon as possible, in order to close our country's existing current deficit, which is already quite high, beside traditionally foreign currency earning export and tourism sectors, there is an urgent necessity to clear the way of International Contracting services sector through removing obstacles and providing all kinds of possible legal and financial support.

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